



DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 36

[Docket No. FWS-R7-NWRS-2017-0058; FXRS12610700000-212-FF07R00000]

RIN 1018-BC74

Refuge-Specific Regulations; Public Use; Kenai National Wildlife Refuge

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule; withdrawal.

SUMMARY: The U.S. Fish and Wildlife Service (Service, we) is withdrawing our June 11, 2020, proposed rule to amend the refuge-specific regulations for Kenai National Wildlife Refuge (NWR, Refuge) related to the harvest of brown bears at bait stations, trapping under State law without a Federal permit, discharge of firearms along the Kenai and Russian Rivers, increased access for the use of bicycles and game carts, and the use of snowmobiles, all-terrain vehicles, and utility task vehicles on certain lakes when there is adequate snow and ice cover. Based on the extensive public comments submitted in opposition to the June 11, 2020, proposed rule and new information and scientific literature not previously considered, we have determined that the best course of action is to withdraw the proposed rule.

DATES: The proposed rule that published on June 11, 2020 (85 FR 35628), to amend the refuge-specific regulations for Kenai NWR is withdrawn on [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Brian Glaspell, Alaska National Wildlife Refuge Chief, Alaska Regional Office, 1011 East Tudor Road, Anchorage, AK 99503; telephone: 907-786-3584. Individuals in the United States who are deaf, deafblind, hard of hearing, or have a speech disability may dial 711 (TTY, TDD, or

TeleBraille) to access telecommunications relay services. Individuals outside the United States should use the relay services offered within their country to make international calls to the point-of-contact in the United States.

SUPPLEMENTARY INFORMATION:

Background

On June 11, 2020, the Service published in the *Federal Register* (85 FR 35628) a proposed rule to amend the refuge-specific regulations for Kenai NWR at 50 CFR 36.39 to allow the harvest of brown bears at registered bait stations, allow for trapping under State law without a Federal permit, allow the discharge of firearms along the Kenai and Russian Rivers at certain times of year, increase access by bicycles and game carts, and allow snowmobiles, all-terrain vehicles, and utility task vehicles on certain lakes when there is adequate snow and ice cover.

Refuge management is governed by Federal laws, such as the National Wildlife Refuge System Administration Act of 1966 (16 U.S.C. 668dd–668ee), as amended by the National Wildlife Refuge System Improvement Act of 1997 (Improvement Act; Pub. L. 105–57) (Refuge Administration Act, as amended); the Alaska National Interest Lands Conservation Act of 1980 (Pub. L. 96–487) (ANILCA); and the Wilderness Act of 1964 (16 U.S.C. 1131 et seq.) (Wilderness Act); by regulations implementing these laws; by treaties; by Service policy; and by principles of sound resource management that establish standards for resource management or limit the range of potential activities (e.g., visitor use opportunities administered via special use permitting) that may be allowed on the Refuge.

Our authority to enact refuge-specific regulations stems from the Refuge Administration Act, as amended, which states that when the Secretary determines that a proposed wildlife-dependent recreational use is a compatible use within a refuge, that activity should be facilitated, subject to such restrictions or regulations as may be

necessary, reasonable, and appropriate (16 U.S.C. 668dd(a)(3)(D)). This authority was affirmed in ANILCA (sec. 304(b)). Service regulations at 50 CFR 36.31(a) state that public recreational activities within the Alaska NWRs are authorized if such activities are conducted in a manner compatible with the purposes for which the areas were established. Such recreational activities include, but are not limited to, sightseeing, nature observations and photography, hunting, fishing, boating, camping, hiking, picnicking, and other related activities. Therefore, we manage public recreational activities on the Refuge to ensure they are conducted in manner compatible with the purposes of the Refuge and the mission of the National Wildlife Refuge System, as well as to avoid conflict between the various recreational activities, with priority given to wildlife-dependent recreation.

ANILCA's section 303(4)(B) establishes the following as the purposes of Kenai NWR:

(i) To conserve fish and wildlife populations and habitats in their natural diversity, including, but not limited to, moose, bears, mountain goats, Dall sheep, wolves and other furbearers, salmonoids and other fish, waterfowl and other migratory and nonmigratory birds;

(ii) To fulfill the international treaty obligations of the United States with respect to fish and wildlife and their habitats;

(iii) To ensure, to the maximum extent practicable and in a manner consistent with the purposes set forth in paragraph (i), water quality and necessary water quantity within the Refuge;

(iv) To provide, in a manner consistent with paragraphs (i) and (ii), opportunities for scientific research, interpretation, environmental education, and land management training; and

(v) To provide, in a manner compatible with these purposes, opportunities for fish and wildlife-oriented recreation.

The Wilderness Act created additional purposes for the Kenai NWR. The Wilderness Act states in part that designated wilderness areas are to be managed for the use and enjoyment of the American people in such manner as will leave them unimpaired for future use and enjoyment as wilderness, and so as to provide for the protection of these areas, the preservation of their wilderness character, and for the gathering and dissemination of information regarding their use and enjoyment as wilderness (16 U.S.C. 1131(a)). In addition, the Wilderness Act provides that each agency administering wilderness areas shall be responsible for preserving the wilderness character of the area and shall so administer such area for such other purposes for which it may have been established as also to preserve its wilderness character. Except as otherwise noted in the Wilderness Act, wilderness areas shall be devoted to the public purposes of recreational, scenic, scientific, educational, conservation, and historical use (16 U.S.C. 1133(b)). The Refuge's wilderness purposes apply to the approximately 1.3 million acres of the Congressionally designated Kenai Wilderness.

On June 11, 2020, we published in the *Federal Register* (85 FR 35628) a proposed rule to amend Kenai NWR's public use regulations. We had two public comment periods on the proposed rule for a total of 90 days (see 85 FR 35628, June 11, 2020; and 85 FR 64106, October 9, 2020), and we held two virtual public hearings (on October 26 and 27, 2020; see 85 FR 64106, October 9, 2020). Of the almost 50,000 comments on the proposed rule, all but 123 opposed all or part of the proposed changes. In addition, we received over 95,000 campaign letters in the form of attachments to letter submissions from various organizations and groups that opposed the proposed rule.

Based on the extensive public comments we received on the proposed rule, as well as new information and scientific literature not previously considered and our sound

professional judgment, we have determined that the best course of action is to withdraw the entirety of the June 11, 2020, proposed rule, as discussed further below.

Commenters expressed concerns that the June 11, 2020, proposed rule, particularly the provisions allowing brown-bear baiting and removing restrictions on trapping on the Refuge to align with State regulations, would have significant adverse impacts on brown bears, furbearers, non-target wildlife, and visitor use and safety. Many commenters stated that these provisions of the proposed rule conflicted with the purposes of the Kenai NWR and the Service's responsibilities for managing Alaska NWRs, as outlined in ANILCA and the Refuge Administration Act, as amended. Many commenters stated that the proposed changes would materially detract from the Refuge's mandate in ANILCA to protect wildlife in its "natural diversity." Commenters also stated that we had not properly complied with the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 et seq.) in adequately analyzing the impacts of the proposed rule; that we had not met our obligations under ANILCA and the Improvement Act to ensure all recreation on Kenai NWR is compatible with the purposes of the Refuge and the mission of the National Wildlife Refuge System; and that we had not provided reasonable justification for the major change in the Service's position on these issues as required by the Administrative Procedure Act (5 U.S.C. 551 et seq.).

We have never authorized the harvest of brown bears over bait on Kenai NWR. The current regulations prohibiting harvest of brown bears over bait on the Refuge promulgated by a May 5, 2016, final rule (81 FR 27030) codified a prohibition previously in place through a special condition of the Federal special use permit required for the taking of black bears over bait on the Refuge that in turn prohibited the taking of any other species over bait. This prohibition was determined necessary to meet our mandates under ANILCA to conserve healthy populations of wildlife in their natural diversity on the Refuge, especially as bears are explicitly referenced as one of the species the Refuge

is mandated to conserve (as discussed above; see section 303(4)(B) of ANILCA). In addition, we determined the prohibition was necessary to maintain the wilderness character of the Kenai Wilderness as mandated by the Wilderness Act (see 16 U.S.C. 1133(b)) and to meet the Refuge's purpose for providing compatible wildlife-oriented recreational opportunities (both consumptive and non-consumptive). After reviewing the public comments, new information on recent annual levels of human-caused brown bear mortalities on the Kenai Peninsula, and additional scientific literature, we find that the prohibition of harvest of brown bears over bait on the Refuge is still necessary.

We continue to believe, as discussed in the May 5, 2016, final rule (81 FR 27030), that allowing the harvest of brown bears over bait on the Refuge has a high potential to result in adverse impacts to the Refuge's brown bear population, and that a cautious approach to management of Kenai Peninsula brown bears remains scientifically warranted. Brown bears have one of the lowest reproductive potentials of any North American mammal, and at current densities, the Kenai brown bear population remains a relatively small population (Morton et al. 2016) that is highly sensitive to adult female and overall human-caused mortality levels. Genetics studies have determined that Kenai brown bears comprise an insular population (reported in the Canadian Journal of Zoology in 2008 by Jackson et al.), which means that immigration from mainland Alaska will not assist in sustaining the population, and that Kenai brown bears have very low haplotypic genetic diversity (Jackson et al. 2008), which has unknown but potentially important conservation implications.

The Kenai brown bear population will continue to be strongly influenced by habitat loss and fragmentation and by multiple potential sources of human-caused mortality as the human population continues to grow on the Kenai Peninsula and recreational use of public lands increases. Additionally, timely and accurate monitoring of the status of the Kenai Peninsula brown bear population is extremely difficult at best,

costs associated with monitoring are high, and funding for monitoring is usually limited and never guaranteed. This is important given that the increased effectiveness of harvesting brown bears over bait would likely mask the effects of reduced bear densities on harvest success, thereby increasing potential for overharvest in the absence of adequately rigorous population monitoring.

The Refuge contains a significant portion of the Kenai Peninsula's core brown bear habitat, which in turn supports a significant portion of the Kenai Peninsula's brown bear population. Baiting is a highly effective method of hunting brown bears, as demonstrated by the fact that since it was first allowed under State regulations on the Kenai Peninsula in 2014, the number of brown bears taken over bait has comprised over 54 percent of the overall harvest (184 of 340). Its effectiveness is even more evident when considering that most of the harvest of brown bears over bait occurs within a short timeframe during the last two weeks of May, as compared to harvest not using bait which occurs over a much longer period (most brown bears are taken during May, September, or October within a September 1 to May 31 hunting season).

Population modeling by the Service (using the model Vortex 9.9) suggests that known human-caused mortality of brown bears from 2012 to 2014 reversed the previous increasing trajectory of the brown bear population and resulted in a decline of approximately 18 percent (a modeled decline from the 2010 population estimate of 582 bears to 478 bears) in the overall Kenai Peninsula brown bear population. We would expect that annual harvest mortality would again increase and possibly be maintained over a longer period if baiting were allowed on the Refuge given this method's effectiveness and that the Refuge contains substantially higher quality habitat and higher bear densities than the vast majority of areas outside of the Refuge currently open to baiting. Higher brown bear harvests over a longer time period could again drive

population declines that would be inconsistent with our mandate to conserve healthy fish and wildlife populations, including brown bears, in their natural diversity.

Allowing baiting for brown bears on the Refuge would also negatively impact the wilderness character of the Kenai Wilderness. Both population-level impacts to the Refuge's brown bears and placement of artificial food sources used as bait, which affects behavior and distribution of wildlife species utilizing these attractants, would negatively impact the untrammeled and natural qualities of the Kenai Wilderness.

Finally, in accordance with the Refuge Administration Act, as amended, the Service has an obligation not to allow any uses of the Refuge that are inconsistent with public safety (16 U.S.C. 668dd(d)(3)(A)(i)). Therefore, ensuring public safety is integral to the purpose of any regulations regarding uses of the Refuge. The Service believes that baiting of brown bears has the potential to modify bear behavior and increase human-bear conflicts, and that allowance of this method would increase baiting activity on the Refuge; therefore, allowing this method on the Refuge has the potential to pose an increased risk to public safety, which we discuss further in our May 5, 2016, final rule (81 FR 27030).

As to the Federal permit requirement for trapping on the Refuge, information and scientific literature submitted during the public comment period supported maintaining this regulatory requirement to ensure compatibility with the purposes of the Refuge and the mission of the National Wildlife Refuge System (Trapping Compatibility Determination, U.S. Fish and Wildlife Service, Kenai National Wildlife Refuge, August 2007). The Federal permit remains necessary due to its importance in ensuring public safety, decreasing user conflicts on the Refuge, and minimizing adverse impacts on non-target wildlife. The stipulations of the Federal trapping permit include a number of refuge-specific requirements not covered under State general trapping regulations, which we consider necessary to ensure compatibility as they support conservation of species in

their natural diversity on the Refuge by reducing incidental take of non-target species (e.g., moose, caribou, black and brown bears, eagles, ravens, crows, magpies and other migratory birds, and lynx when the season is closed) and conserving furbearers population that occur at low densities on the Refuge (e.g., red fox, marten, and beaver). Another main objective of the stipulations is to reduce user conflicts and enhance public safety in areas of high recreational use. The framework for managing the Refuge trapping program was developed through extensive public planning processes dating back to the Refuge's first comprehensive conservation plan in 1986, and furbearer management plan in 1988. This framework has allowed us to maintain a successful trapping program on the Refuge for decades.

As to the proposed increased access for snowmobiles, all-terrain vehicles, and utility task vehicles on designated lakes on the Refuge when there is adequate snow and ice cover, the Service believes this would result in temporary disturbance of wildlife and habitat impacts. The increased presence and use of motorized vehicles on these lakes may also negatively impact other visitors and increase potential for accidental fuel discharges. For example, allowance of snowmobiles, all-terrain vehicles, and utility task vehicles on these lakes is likely to lead to recreational riding of these vehicles unassociated with ice fishing, thereby increasing potential for conflict with participants in this popular winter activity on Refuge lakes. It would also likely result in increased unauthorized use of these vehicles on adjacent upland and wetland habitats, with resultant impacts to soils, habitats, and wildlife.

In further considering changes to firearm discharge restrictions along the Russian and Kenai Rivers, the Service finds that limiting the firearms restriction to the months of May through October, as outlined in the June 11, 2020, proposed rule (85 FR 35628), is insufficient to address public safety issues associated with firearms discharge along these rivers. As previously explained, under the Refuge Administration Act, as amended, the

Service has an obligation not to allow any uses on a refuge that are inconsistent with public safety (16 U.S.C. 6688dd(d)(3)(A)(i)). Additionally, Service regulations at 50 CFR 36.42(b) provide that in determining whether to close an area or restrict an activity, the Refuge Manager shall be guided by several factors, including public health and safety. Therefore, for the reasons outlined in the May 5, 2016, final rule, and having completed additional analyses under NEPA, we are maintaining the year-round restriction on firearms discharge along the Kenai and Russian Rivers to ensure public safety in these intensively used river corridors. Maintaining this firearm restriction also provides consistency with U.S. Forest Service regulations restricting use of weapons in the vicinity of developed recreational facilities (36 CFR 261.10(d)), which apply to an adjoining area of similar size in the Chugach National Forest from the Russian River's confluence with the Kenai River upstream to the Russian River Falls.

Lastly, the Service believes that the provisions of the proposed rule that would increase access for bicycles and game carts on designated roads, rights-of-way, and trails needs further planning, public involvement, and compliance with NEPA.

For the reasons provided above, we are withdrawing the proposed rule that published on June 11, 2020 (85 FR 35628), to amend the refuge-specific public use regulations for Kenai NWR.

References Cited

A complete list of references cited in this document is available on the internet at <https://www.regulations.gov> at Docket No. FWS-R7-NWRS-2017-0058 and upon request from the person listed above under **FOR FURTHER INFORMATION CONTACT**.

Authority

The authority for this action is the National Wildlife Refuge System Administration Act of 1966 (16 U.S.C. 668dd–668ee), as amended by the National Wildlife Refuge System Improvement Act of 1997 (Pub. L. 105–57); the Alaska National

Interest Lands Conservation Act of 1980 (Pub. L. 96–487); and the Wilderness Act of 1964 (16 U.S.C. 1131 et seq.).

Shannon Estenoz,
Assistant Secretary for Fish and Wildlife and Parks.

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